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SUBCHAPTER 18. PUBLIC ACCESS TO INFORMATION AND REQUIREMENTS FOR DETERMINATION OF CONFIDENTIALITY

7:14A-18.1 Public access to information and scope of authority

- (a) Except as otherwise provided in N.J.S.A. 47:1A-1 et seq., any records, reports or information obtained by the Department, or required to be developed and retained by the permittee as a permit condition pursuant to this chapter, the State Act or N.J.S.A. 58:11-53, including all NJPDES permit applications, documented information concerning actual and proposed discharges, comments received from the public, draft and final NJPDES permits, and related correspondence shall be made available to the public for inspection and duplication at the offices of the Department.
- (b) For facilities with NJPDES permits for discharges to ground or surface water but which are otherwise within the jurisdiction of the Resource Conservation and Recovery Act, 42 U.S.C. §6901 and/or the Hazardous and Solid Waste Amendments of 1984 to that Act, public access to information shall be regulated pursuant to N.J.A.C. 7:26G.

7:14A-18.2 Confidentiality

- (a) The Department shall protect from disclosure any information, other than effluent data, upon a satisfactory showing by any person that the information, if made public, would divulge methods or processes entitled to protection as trade secrets of such persons. The Department's decision on the claim of confidentiality shall be made in accordance with the substantive criteria listed in N.J.A.C. 7:14A-18.6. The access to any information deemed to be confidential by the Department shall be limited to authorized officers or employees of the Department and the Federal government. For purposes of this subchapter the term "information" shall include records, reports, and any other documents, writings, photographs, sound or magnetic recordings, drawings, or other similar formats by which information has been retrieved or copied.
- (b) Included among those items for which claims of confidentiality will be denied are the following:
 1. The name and address of any permit applicant, permittee or co-permittee;
 2. Permits;
 3. Effluent data as defined in N.J.A.C. 7:14A-1.2;
 4. For permits under the UIC program, information which concerns the existence, absence, or level of contaminants in drinking water; and

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5. Information required by NJPDES permit application forms provided by the Department under N.J.A.C. 7:14A-4. This includes information on the forms themselves and any attachments used to supply information required by the forms.

7:14A-18.3 Procedures for asserting confidentiality

- (a) Any person may assert a confidentiality claim regarding information, in whole or in part, by following the procedures set forth in (b) through (f) below.
- (b) Any person submitting information to the Department and asserting a confidentiality claim covering any of the information shall submit two sets of documents to the Department. The first set shall contain all information requested by the Department, including any information which the person alleges to be entitled to confidential treatment. The second set, which will go into the public file, shall be identical to the first set except that it shall not contain information which the person alleges to be entitled to confidential treatment. In order to provide the public notice that information has been omitted from the second set under a claim of confidentiality, the second set shall indicate where such deletions have been made.
- (c) The top of each page of the first set containing the information which the person alleges to be entitled to confidential treatment shall display the heading "**CONFIDENTIAL**" in bold type or stamp.
- (d) All parts of the text of the first set which the person alleges to be entitled to confidential treatment shall be underscored or highlighted in a clear manner. Translucent ink markers are acceptable for this purpose.
- (e) The outside of the envelope containing the first set containing the information which the person alleges to be entitled to confidential treatment shall display the word "**CONFIDENTIAL**" in bold type on both sides.
- (f) The person submitting the sets of information shall send them to the appropriate permitting office by certified mail (return receipt requested), or by other means which provides verification of the date of delivery to the Department.

7:14A-18.4 Fees for a claim of confidentiality

Any person submitting documents to the Department under a claim of confidentiality shall submit a check in the amount of \$250.00 for the first 50 confidential pages and \$1.00 for each page thereafter, to cover the additional costs of processing and protecting the confidential information.

7:14A-18.5 Procedure for confidentiality determinations

- (a) Information for which a confidentiality claim has been asserted shall be treated

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by the Department as entitled to confidential treatment unless and until the Department determines that the information is not entitled to confidential treatment as provided in this section.

- (b) The Department shall determine whether the information is entitled to confidential treatment whenever the Department:
 - 1. Receives a request under the Open Public Records Act, N.J.S.A. 47:1A-1 et seq., to inspect or copy such information; or
 - 2. Desires to determine whether information in its possession is entitled to confidential treatment, even though no request to inspect or copy such information has been received.
- (c) The initial determination of entitlement to confidential treatment is as follows:
 - 1. If, in connection with any person's claim, the Department makes a preliminary determination that the information may be entitled to confidential treatment, the Department shall:
 - i. Furnish the notice of opportunity to submit comments as specified in (d) below to the affected person who is known to have asserted an applicable claim and who has not previously been furnished such notice with regard to the information in question; and
 - ii. Furnish, to any person whose request for release of the information is pending under N.J.S.A. 47:1A-1 et seq., a notification that the information may be entitled to confidential treatment under this subchapter, that further inquiry by the Department pursuant to this subsection is required before a final determination on the request can be issued, that the person's request is therefore initially denied, and that after further inquiry a final determination shall be issued by the Department.
 - 2. If, in connection with all applicable claims, the Department determines that the information clearly is not entitled to confidential treatment, the Department shall take the actions required by (g) below.
- (d) The Department shall provide notice to the affected person and an opportunity to comment as follows:
 - 1. Whenever required by (c)1i above, the Department shall promptly furnish the affected person a written notice stating that the Department is in the process of determining under this subchapter whether the information is entitled to confidential treatment, and that the affected person shall substantiate the claim by submitting comments. The notice shall be furnished by certified mail (return receipt requested), or by other means

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which provides verification of the date of delivery to the Department. The notice shall state the address of the office to which the affected person's comments shall be addressed, the time allowed for comments, and the method for requesting a time extension under (d)1ii below. The notice shall further state that the Department will construe a person's failure to furnish timely comments as a waiver of the person's claim.

- i. If action under this section is occasioned by a request for the information under N.J.S.A. 47:1A-1 et seq., the period for comment shall be 10 days after the date of the affected person's receipt of the written notice. In other cases, the period for comment shall be 20 days after the person's receipt of the written notice. In all cases, the notice shall reference the provisions of (d)1ii below.
 - ii. The period of submission of comments may be reasonably extended if, before comments are due, a request for an extension of the comment period is made by the affected person and approved by the Department. Except in extraordinary circumstances, as determined by the Department, the Department shall not approve such an extension without the consent of any person whose request for release of the information under N.J.S.A. 47:1A-1 is pending.
2. The written notice required by (d)1 above shall inform the affected person of the requirement to submit comments on the following points, subject to (d)3 below:
- i. Measures taken by the person to guard against undesired disclosure of the information to others;
 - ii. The extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
 - iii. Pertinent confidentiality determinations, if any, by the Department, by USEPA or by other agencies, and a copy of any such determination, if available, or reference to it;
 - iv. Whether the person asserts that disclosure of the trade secret information would be likely to result in substantial harmful effects on the person's competitive position, and if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects; and
 - v. The period of time for which confidential treatment is desired by the person.
3. New information, not submitted in the initial claim for confidentiality,

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provided it is marked when received in accordance with N.J.A.C. 7:14A-18.3 shall be regarded by the Department as entitled to confidential treatment if in accordance with the criteria listed in N.J.A.C. 7:14A-18.6, the Department determines that the information is entitled to confidential treatment. This new information shall not be disclosed by the Department without the person's consent, unless its disclosure is duly ordered by a court, notwithstanding other provisions of this subchapter to the contrary.

- (e) An affected person shall be determined to have waived his or her claim of confidentiality as follows:
 - 1. If the Department finds that a person has failed to furnish comments as required under this section, it shall determine that the person has waived his or her claim, and that the information is therefore not entitled to confidential treatment under this subchapter and is available to the public.
 - 2. In all other cases, the Department shall determine with respect to each claim whether or not the information is entitled to confidential treatment for the benefit of the affected person.
- (f) If, in accordance with the criteria listed in N.J.A.C. 7:14A-18.6, the Department determines that the information is entitled to confidential treatment, it shall maintain the information in confidence, subject to court order, any applicable court rules, N.J.A.C. 7:14A-18.9, 18.10, 18.12 and 18.13 or other provisions of this subchapter which authorize disclosure in specified circumstances, and the Department shall so inform the affected person. If any person's request for the release of the information is then pending under N.J.S.A. 47:1A-1 et seq., the Department shall issue a determination denying that request, which shall state the basis for the determination and that it constitutes final agency action.
- (g) If, in accordance with the criteria listed in N.J.A.C. 7:14A-18.6, the Department determines that the information is not entitled to confidential treatment, the Department shall so notify the affected person. Such notice of denial, or partial denial, of a confidentiality claim shall be in writing, and shall be furnished by certified mail, return receipt requested or by other means which provides verification of the date of delivery to the Department. The notice shall state the basis for the determination, that it constitutes final agency action concerning the confidential claim, and that the Department shall make the information available to the public 10 days after the date of the affected person's receipt of the notice.
- (h) If the Department finds that disclosure of information covered by a confidentiality claim would serve to alleviate a situation posing an imminent and substantial danger to public health or safety, it may prescribe such shorter comment period as it finds necessary under the circumstances and make such shorter comment period known to affected persons pursuant to (d)1 above or post-determination waiting period pursuant to (g) above, or both; or disclose

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confidential information to any person whose role in alleviating the danger to public health or safety necessitates that person's knowing the information. Any such disclosure shall be limited to the minimum information necessary to enable the person to whom it is disclosed to carry out his or her role in alleviating the dangerous situation.

1. Any disclosure made pursuant to this section shall not be deemed a waiver of a confidentiality claim, nor shall it of itself be grounds for any determination that information is no longer entitled to confidential treatment.

7:14A-18.6 Substantive criteria for confidentiality determinations

(a) A determination made under N.J.A.C. 7:14A-18.5 shall hold that trade secret information is entitled to confidential treatment if:

1. The person has asserted a confidentiality claim;
2. The person has satisfactorily shown that he or she has taken reasonable measures to protect the confidentiality of the information, and that he or she intends to continue to take such measures;
3. The information is not, and has not been, reasonably obtainable, without the person's consent, by other persons (other than governmental bodies) using legitimate means (other than discovery based on a showing of special need in a judicial or quasi-judicial proceeding);
4. No statute requires disclosure of the information; and
5. The person has satisfactorily shown that disclosure of the information would be likely to cause substantial harm to the person's competitive position.

7:14A-18.7 Class determinations

(a) The Department may make a determination that a certain class of information is or is not entitled to confidential treatment under this section if it finds that:

1. The Department possesses, or is obtaining, related items of information; and
2. One or more characteristics common to all such items of information will necessarily result in identical treatment for each such item, and that it is therefore proper to treat all such items as a class.

(b) A class determination shall clearly identify the class of information to which it pertains.

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- (c) A class determination shall state that all of the information in the class:
 - 1. Fails to satisfy one or more of the applicable criteria in N.J.A.C. 7:14A-18.6, and is therefore ineligible for confidential treatment; or
 - 2. Satisfies the applicable criteria in N.J.A.C. 7:14A-18.6, and is therefore eligible for confidential treatment.

7:14A-18.8 Access to and safeguarding of confidential information

- (a) Unless specifically provided for by Federal law, State law, court order, or applicable court rule, no person shall have access to information which has been determined to be entitled to confidential treatment, other than:
 - 1. The designated Department personnel;
 - 2. Federal or other State agencies, subject to the provisions of N.J.A.C. 7:14A-18.9 or 18.12; or
 - 3. Authorized representatives of the Department, subject to the provisions of N.J.A.C. 7:14A-18.10.
- (b) Each Department officer or employee who has custody or possession of confidential information shall take appropriate measures to properly safeguard such information and to protect against its improper disclosure.
- (c) No Department officer or employee shall disclose, or use for his or her private gain or advantage, any confidential information which came into his or her possession, or to which he or she gained access, by virtue of his or her official position of employment, except as authorized by N.J.A.C. 7:14A-18.10.
- (d) If the Department finds that any person has violated this subchapter, it shall:
 - 1. Commence a civil action in Superior Court for a restraining order and an injunction barring that person from further disclosing confidential information; and/or
 - 2. Pursue any other remedy available to it by law.
- (e) In addition to any other penalty that may be sought by the Department, violation of this subchapter by a Department employee, thereby exceeding the scope of his or her authority, shall constitute grounds for dismissal, suspension, fine or other adverse personnel action.

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7:14A-18.9 Disclosure of confidential information to State, Interstate and Federal agencies with the exception of the USEPA and the U.S. Department of Justice

- (a) The Department shall disclose information which has been determined to be entitled to confidential treatment to State, interstate, and Federal agencies, other than the USEPA and U.S. Department of Justice, as provided at N.J.A.C. 7:14A-18.12, if:
1. The Department receives a written request for disclosure of the information from a duly authorized officer or employee of the other agency;
 2. The request sets forth the official purpose for which the information is needed;
 3. The Department notifies the other agency of its determination that the information is entitled to confidential treatment;
 4. The other agency has first furnished to the Department a written opinion from the agency's chief legal officer or counsel stating that under applicable law the agency has the authority to compel the person who submitted the information to the Department to disclose such information to the other agency; and
 5. The other agency agrees not to disclose the information further, unless the other agency has statutory authority both to compel production of the information and to make the proposed disclosure.
- (b) Except as provided in N.J.A.C. 7:14A-18.5(h) (emergency disclosure), and N.J.A.C. 7:14A-18.12, the Department shall notify the affected person in writing of its intention to disclose information which has been determined to be entitled to confidential treatment to any other governmental agency at least 10 days in advance of the disclosure.

7:14A-18.10 Disclosure of confidential information to authorized agents

- (a) The Department shall disclose information which has been determined to be entitled to confidential treatment to an authorized agent, under contract with the Department, if:
1. The Department determines that such disclosure is necessary in order for the agent to carry out the work required by the contract;
 2. The Department notifies the affected person; and
 3. The agent contracts with the affected person to protect the confidentiality of the information.

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- (b) No information shall be disclosed under (a) above unless the contract in question provides that the agent and the agent's employees shall use the information only for the purpose of carrying out the work required by the contract, shall refrain from disclosing the information to anyone other than the Department, and shall return to the Department all copies of the information, and any abstracts or extracts therefrom, upon request by the Department or whenever the information is no longer required by the agent for the performance of the work required by the contract.
- (c) Violation of the contractual provisions of (b) above by the agent or the agent's employee in question shall constitute grounds for debarment or suspension as provided under the rules regarding debarment, suspension and disqualification from department contracting, at N.J.A.C. 7:1D-2.

7:14A-18.11 Designation by person of an addressee for notices and inquiries

- (a) Any affected person who wishes to designate a specific person or office as the proper addressee of communications from the Department under this subchapter may do so by furnishing in writing to the Department the following information: the name and address of the person making the designation; the name, address, and telephone number of the designated person or office; and a request that Department inquiries and communications (oral and written) under this subchapter be furnished to the person designated pursuant to this section. Only one person or office may serve at any time as an affected person's designee under this subchapter.
- (b) If an affected person has named a particular designee under this section, the following Department inquiries and notices to the affected person shall be addressed to the designee:
 1. Notices to submit comments, under N.J.A.C. 7:14A-18.5(d);
 2. Notices of denial of confidential treatment and proposed disclosure of information, under N.J.A.C. 7:14A-18.5(g);
 3. Notices concerning shortened comment and/or waiting periods under N.J.A.C. 7:14A-18.5(h); and
 4. Notices to affected persons under N.J.A.C. 7:14A-18.9 and 18.10.

7:14A-18.12 Access to information for the USEPA and U.S. Department of Justice

Notwithstanding any other provision of this subchapter, any information obtained or used in the administration of the NJPDES and RCRA programs shall be available to the USEPA and the U.S. Department of Justice upon request without restriction. If the information has been submitted to the Department under a claim of confidentiality, the Department shall submit that

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claim to USEPA and the U.S. Department of Justice when providing information as required in this section.

7:14A-18.13 Use of confidential information in rulemaking, permitting, and enforcement proceedings

- (a) Notwithstanding any other provisions of this subchapter, the Department may, subject to the protection from making the information available to the public as provided in N.J.A.C. 1:1, use information determined to be eligible for confidential treatment pursuant to N.J.A.C. 7:14A-18.5 and 18.6 in rulemaking, permitting and enforcement proceedings.
 - 1. Where the Department uses confidential information in any enforcement proceeding, the Department shall indicate that such information has been used.
 - 2. Where the Department uses confidential information in administrative proceedings, the procedures in (b) and (c) below shall apply.
- (b) Where the Department determines that there shall be an adjudicatory hearing, information determined to be eligible for confidential treatment pursuant to N.J.A.C. 7:14A-18.5 and 18.6 may be used in any enforcement and permitting proceeding as provided in N.J.A.C. 1:1.
- (c) Where the Department determines that there shall not be an adjudicatory hearing, information determined to be eligible for confidential treatment pursuant to N.J.A.C. 7:14A-18.5 and 18.6 may be used in any enforcement, permitting, or rulemaking proceeding as provided below:
 - 1. The affected person shall be informed that the Department is considering using the information in connection with the proceeding and shall afford the person a comment period 10 days after the date of the affected person's receipt of written notice from the Department;
 - 2. The Department, after consideration of any timely comments submitted by the affected person, determines that the information is relevant to the subject of the proceeding;
 - 3. The Department determines that the public interest shall be served by use of the information in the proceeding; and
 - 4. The Department shall give the affected person at least five days notice prior to using the information which may result in the information being made available to the public.

